OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 09-01 October 3, 2008

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Guideline Memorandum Concerning St. George Warehouse

A discriminatee must make reasonable efforts during the backpay period to seek and to hold interim employment. A discriminatee is not due backpay for any period within the backpay period during which the Region determines that he or she failed to make a reasonable effort to mitigate. In St. George Warehouse,[1] the Board changed the burden of producing evidence concerning employees' efforts to find interim employment after an unlawful discharge. The decision does not, however, require any change in our compliance practices during the backpay period. Thus, while St. George does modify the burdens in a compliance hearing, those modifications simply reinforce the current requirements of the Casehandling Manual,[2] as set out in Sections 10508.8 and 10558.1, which provides that Board agents should investigate a discriminatee's search for work and, to that end, remain in regular contact with discriminatees and remind them of their need to mitigate and keep records of their search.

Regions should continue to adhere to these requirements, and where the investigation discloses that there has not been a good faith effort to mitigate losses, the compliance specification should omit backpay for those periods. In the event litigation becomes necessary, the Region should be prepared to defend its Compliance Specification and to do so in light of the St. George burden.

The purpose of this memorandum is to provide casehandling guidance for applying the new burden in compliance proceedings.

---

[1] 351 NLRB No. 42 (September 2007).

[2] NLRB Casehandling Manual, Part 3, Compliance Proceedings (Casehandling Manual).

I. The *St. George Warehouse* Decision

A. Background

In the litigation of a Compliance Specification, the General Counsel bears the burden of proving the amount of gross backpay due the discriminatee.[3] Once the General Counsel has met this burden, the respondent may raise affirmative defenses seeking to reduce the backpay amount further by showing, among other things, that the discriminatee had not sought to mitigate backpay by making reasonable efforts to find interim employment.[4]

Prior to St. George Warehouse, the respondent bore the entire burden with respect to the affirmative defense of failure to mitigate, i.e., both the burden of producing evidence that a discriminatee failed to make a reasonable search for work, and the ultimate burden of persuasion, or proof, that the discriminatee failed to make a reasonable search for work.[5] In St. George Warehouse, the Board specifically articulated the burden of producing evidence as having two elements: (1) there were substantially equivalent jobs within the relevant geographic area; and (2) the discriminatee unreasonably failed to apply for these jobs.[6] The Board also changed the way it allocated the burden of production based on those two elements.

---

[3] Id., slip op. at 3, citing NLRB v. Brown & Root, 311 F.2d 447, 454 (8th Cir. 1963); Kawasaki Motors Mfg. Corp. v. NLRB, 850 F.2d 524, 527 (9th Cir. 1988). Gross backpay is what the discriminatee would have earned from respondent had there been no unlawful action. Earnings include not just wages, but all other forms of compensation such as vacation pay, health and retirement benefits, bonus payments, and use of vehicles. The General Counsel reduces that amount by the discriminatee's interim earnings from the time of the discharge to the date the employer offers reinstatement (net backpay). See Casehandling Manual, 10536.2.

[4] St. George Warehouse, 351 NLRB No. 42, slip op. at 3. See also NLRB v. Arduini Mfg. Co., 394 F.2d 420, 423 (1st Cir. 1968).

[5] See St George Warehouse, 351 NLRB No. 42, slip op. at 1. See also, e.g., Minette Mills, Inc., 316 NLRB 1009, 1010-1011 (1995); NLRB v. Mooney Aircraft Inc., 366 F.2d 809, 813 (5th Cir. 1966).

[6] See St. George Warehouse, 351 NLRB No. 42, slip op. at 1.

Specifically, the Board reaffirmed that the respondent must produce evidence regarding the first element of the burden that substantially equivalent jobs were available in the relevant geographic area during the backpay period; but it placed on the General Counsel the burden – once the respondent produces evidence on the first element - to produce competent evidence that the discriminatee took reasonable steps to seek those jobs.[7] At the same time, the Board reaffirmed that the respondent continues to bear the ultimate burden of proof as to its contention that the discriminatee failed to mitigate damages by making a reasonable search for work.[8]

B. How the Board applied its new burden allocation in *St. George Warehouse*

At the compliance proceeding in St. George Warehouse, the respondent called a "vocational employability specialist," who testified that a sufficient number of jobs that were comparable to the work that the two discriminatees had performed for the respondent (warehouse work and forklift operating) were available during the backpay period in the relevant geographic area. The specialist based her testimony on a "labor market study" that she conducted, which entailed an examination of published sources[9] and local newspaper want ads, and an

[7] Although the Board, in setting out the General Counsel's burden of demonstrating that the discriminatee took reasonable steps to find substantially equivalent jobs, used the term "these jobs" – thus appearing to refer back to those identified by the respondent in meeting its burden of production - the Board elsewhere in its decision made clear that the General Counsel's burden focuses on the discriminatee's search for work in general, and not on any particular jobs. See, e.g., id., slip op. at 6 (General Counsel "will have to produce some competent evidence of the discriminatee's job search"). The Board's decision should thus not be interpreted to now require a showing that the discriminatee specifically sought the *particular* jobs that the respondent's evidence suggests were available. Nevertheless, if a respondent identifies jobs that were substantially equivalent, it would be prudent to have the discriminatee address whether he or she applied for those jobs and if not, why.

[8] 351 NLRB No. 42, slip op. at 5.

[9] The sources included the Dictionary of Occupational Titles, Occupational Employment Statistics, Projections 2008, and New Jersey Employment and Population in the 21st Century. 351 NLRB No. 42, slip op. at 2.

analysis of the transferability of job skills. The respondent did not call the discriminatees to the stand or elicit testimony regarding their job searches. Counsel for the General Counsel, relying on then-existing Board law that allocated to the respondent the entire burden of production on failure to mitigate, introduced no evidence regarding either element, i.e., either refuting the employability specialist's testimony that jobs were available or demonstrating that the discriminatees searched for jobs.

The Board, applying its new burden allocation, held that the respondent, through the testimony of the employability specialist, had met its burden of producing evidence showing that substantially equivalent jobs were available to the two discriminatees. The Board further held that the discriminatees and General Counsel had not met their burden as to the second element. However, because Board law at the time of the compliance proceeding did not impose such an obligation on the General Counsel, the Board remanded the case to the judge to reopen the record and permit the parties to produce evidence consistent with its decision.[10]

The Board also offered some guidance regarding the type of evidence that would meet the General Counsel's burden of production. Specifically, the Board explained that, although the General Counsel typically produces the discriminatee to testify as to his or her own job search, in circumstances where that is not feasible (such as where a discriminatee has died), the General Counsel may also satisfy its burden of production by providing other competent evidence as to the search. Such evidence may be in the form of documentary evidence or the testimony of someone familiar with the discriminatee's job search.[11]

II. Litigating Backpay Proceedings in Light of *St. George Warehouse*

The changed burden enunciated in St. George Warehouse increases the likelihood that Regions will have to litigate in compliance proceedings whether discriminatees conducted a reasonable search for work. That is because under St. George Warehouse, once the respondent produces evidence that substantially equivalent jobs were available, Regions must present specific evidence demonstrating the discriminatee's search for work. Thus, as discussed more fully below, where the Region has concluded that a

[10] St. George Warehouse, 351 NLRB No. 42, slip op. at 1.

[11] Id., slip op. at 5.

discriminatee has conducted a reasonable search for work, the Region should be prepared, consistent with the facts developed in its investigation or examination at trial, to rebut the adequacy of any evidence submitted by the respondent in meeting its burden that substantially equivalent jobs were available, and, even assuming the respondent has met its burden of production as to the availability of substantially equivalent jobs, produce evidence demonstrating that the discriminatee conducted a reasonable job search. Finally, the Region should be prepared, where appropriate, to argue that, due both to defects in the respondent's evidence regarding the availability of jobs, as well as the strength of the General Counsel's evidence regarding the discriminatee's search for work, the respondent has failed to meet its ultimate burden of persuasion. The Region should continue to use the Casehandling Manual for guidance in preparing and litigating compliance proceedings.

A. Element of proof that there were substantially equivalent available jobs

As the Casehandling Manual provides, during the investigation the Region should affirmatively seek to determine the specific evidence upon which the respondent intends to rely to support its contention that substantially equivalent jobs were available. If the respondent intends to call an expert witness, the Region should ascertain the data upon which the expert intends to rely so that it can effectively cross-examine the witness and, where appropriate, rebut the proffered evidence.[12]

Where the respondent, as in St. George Warehouse, plans to prove a lack of diligence in seeking interim employment by putting into evidence documentation showing the existence of jobs, the Region should be prepared, where appropriate, to argue how the proffered evidence does not reliably establish either that those jobs were substantially equivalent or that the particular discriminatee could have obtained those jobs.[13] Differences

[12] If the respondent refuses to cooperate in the Region's backpay investigation, the Region should likewise refuse to make available to the respondent information prepared by the Region regarding the computation of backpay or regarding the evidence it intends to submit at the hearing. See Casehandling Manual, 10650.5.

[13] In St. George Warehouse, 351 NLRB No. 42, the Board focused on the General Counsel's burden of production regarding the discriminatee's search for work; it did not specifically address whether the General Counsel could refute respondent's evidence regarding the availability of

in specifics such as location, type of work, rate of pay, and other working conditions may demonstrate that the respondent's proffered evidence does not establish that the jobs were substantially equivalent. For example, the Region's cross-examination of respondent's expert witness should, where appropriate, elicit any distinctions between the jobs asserted by the witness to be substantially equivalent and the job that the discriminatee actually performed.[14] Similarly, to the extent the respondent relies on newspaper advertisements, the Region should point out if they lack specificity regarding those details. Indeed, advertisements may be less probative if they do not include the number of positions available and how many, if any, applicants with the discriminatee's qualifications actually obtained jobs from those advertisements.[15]

Nonetheless, the Region must conduct its own investigation regarding the availability of substantially equivalent jobs and not rely merely on the accuracy and probative nature of the evidence submitted by the respondent's expert. For example, as discussed in the Casehandling Manual, the Region can obtain information from the U.S. Department of Labor, Bureau of Labor Statistics, regarding local area, private sector, employment and unemployment rates during the backpay period,[16] or interview knowledgeable union officials and local and state employment service officials to learn the impact, if any, of local market conditions on the availability of work for

---

jobs for purposes of arguing that respondent failed to meet its burden of production. Nevertheless, defects in the respondent's evidence regarding the availability of jobs, as well as evidence demonstrating the discriminatee's search efforts, are relevant in determining whether the respondent has met its ultimate burden of proving that the discriminatee failed to conduct a reasonable search. See, e.g., NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 576 (5th Cir. 1966); Cornwell Co., 171 NLRB 342, 343 (1968).

[14] Casehandling Manual, 10666.5.

[15] See Casehandling Manual, 10666.4. See also St. George Warehouse, Inc., Second Supplemental Decision, 2008 WL 2165213 (NLRB Div. of Judges, May 20, 2008) (No. 22-CA-23223, JD(NY)-18-08, Kearny, NJ), slip op. at 13 (hereafter St. George Warehouse, Second Supplemental ALJD), quoting Bauer Group, 337 NLRB 395, 398 (2002). Although newspaper advertisements are less probative, it is nevertheless prudent to elicit the discriminatee's response to this evidence.

[16] Casehandling Manual, 10660.6

people with the discriminatee's skills and experience.[17] If warranted, the Region may have to rebut evidence submitted by the respondent's expert regarding job vacancies in the geographical area by its own experts' testimony. Such testimony can both contradict the respondent's analysis of the number of vacancies and also provide more specific evidence regarding the number of vacancies within the job experience and background of the discriminatee, the rates of pay offered for those vacancies, and the number of people remaining unemployed on the state employment service or union rolls during the existence of those job openings.[18]

In sum, where litigation becomes necessary, the General Counsel must endeavor to point out weaknesses in the respondent's evidence regarding the existence of substantially equivalent jobs because the determination whether the discriminatee failed to conduct a reasonable search, and thus whether the respondent has met its ultimate burden of proof, must be made in the context of whether substantially equivalent jobs were actually available.

B. Meeting burden of production that the discriminatee conducted a reasonable job search

Once the respondent proffers evidence that substantially equivalent jobs were available, and the Region has introduced evidence to the contrary (if any), then the Region should be prepared to also produce evidence demonstrating that the discriminatee conducted a reasonable job search.[19] In this regard, the trial attorney should adduce evidence in sufficient detail regarding all the discriminatee's job search efforts during the entire backpay period. Toward this end, during the investigation of a charge, the Board Agent should advise the alleged discriminatee of his or her responsibility to seek interim employment and direct the discriminatee to maintain careful notes and records of the entire search for work.[20] This

[17] Casehandling Manual, 10660.6, 10666.5.

[18] Ibid.

[19] See St. George Warehouse, 351 NLRB No. 42, slip op. at 1, fn. 5 ("Nor do we disturb the principle that if a discriminatee 'has exercised no diligence whatsoever the circumstance of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant,'" citations omitted).

[20] Casehandling Manual, 10508.8, 10558.2. Significantly, the Board has recently held that in order for backpay to run from the date of the respondent's unlawful action,

will make it more likely that if the case ultimately goes to a compliance proceeding, there already will exist the detailed record needed to rebut the respondent's claim that the discriminatee failed to make a reasonable search for work.[21]

As discussed in the Casehandling Manual, whether a discriminatee made a reasonable search for work will be based on the totality of the discriminatee's job-seeking efforts, and not on the presence or absence of any particular search activity.[22] Further, the efforts that a discriminatee is expected to make are those of a "reasonable person in like circumstances."[23] Actions relevant in determining whether a discriminatee conducted a reasonable search include registering with state or private employment services, checking newspaper and internet advertisements, visiting employers, and seeking leads from friends and relatives.[24] Factors that may limit job

---

unlawfully discharged employees must normally begin their search for interim employment within the two-week period following their unlawful discharge. Discriminatees who fail to commence a search at some point within this 2-week period will not begin to accrue backpay until their proper search has commenced. Grosvenor Resort, 350 NLRB No. 86, slip op. at 3-4 (2007). See also Grosvenor Orlando Associates Operations Memorandum, OM 08-54 (May 15, 2008). This strengthens the need to inform discriminatees as early as possible of their obligation to search for work.

[21] See Casehandling Manual, 10508.8, 10558.2. See also St. George Warehouse, Second Supplemental ALJD, slip op. at 10 ("the detail provided in the discriminatee's listings of jobs applied for was extremely thorough and thus his testimony that he actually made such applications must be credited").

[22] See Casehandling Manual, 10558.3.

[23] Ibid.

[24] Ibid. See also Kentucky River Medical Center, 2008 WL 544882 (NLRB Div. of Judges, February 26, 2008), slip op. at 8 (receipt of unemployment benefits), citing Superior Protection, Inc., 347 NLRB No. 105, slip op. at 3 (2006); Birch Run Welding, 286 NLRB 1316, 1319 (1987). And see St. George Warehouse, Second Supplemental ALJD, slip op. at 8-9 (discriminatee "utilized several different avenues" in his search, i.e., he filed an application for unemployment insurance two weeks and four days after his discharge and extensively utilized the services of that office in an effort to find employment; faxed and e-mailed resumes to companies that advertised for help; took a certification

opportunities must also be taken into consideration. These include the discriminatee's age, health, education, job skills, language skills, employment history, physical disability, or access to a car.[25] Further, a discriminatee is not normally required to move or to accept employment in a lower skilled or lower wage job.[26] Finally, simply showing that the discriminatee, at various times during the backpay period, failed to obtain or retain interim employment does not establish a failure to conduct a reasonable search.[27]

---

course in forklift operation; prepared a professional resume; visited numerous jobs referred to him by the Department of Labor; independently searched for work through newspapers and visits to prospective employers; asked friends for sources of work; and accepted work at temporary agencies).

[25] See, e.g., St. George Warehouse, Second Supplemental ALJD, slip op. at 13 (testimony by respondent's expert that discriminatees had not made a diligent search effort had little weight, where expert never spoke with the discriminatees; only referred to the probability of job opportunities, not to a given individual's situation; and did not consider the unique circumstances that limited the opportunities of those particular discriminatees, such as their reliance on public transportation or a job within walking distance). See also Rainbow Coaches, 280 NLRB 166, 180 (1986); Mastro Plastics Corp., 136 NLRB 1342, 1359 (1962); Lozano Enterprises, 152 NLRB 258, 260 (1965), enfd. 356 F.2d 483 (9th Cir. 1966).

[26] See Casehandling Manual, 10558.3. See also Associated Grocers, 295 NLRB 806, 811 (1989); NHE/Freeway, Inc., 218 NLRB 259 (1975).

[27] See, e.g., Rainbow Coaches, 280 NLRB at 180, 195; Kentucky River Medical Center, supra, slip op. at 7, citing Black Magic Resources, 317 NLRB 721 (1995). See also St. George Warehouse, Second Supplemental ALJD, slip op. at 10, 11-12 (notwithstanding failure to obtain employment during a significant part of the backpay period, deceased discriminatee had conducted reasonable search where he applied for unemployment insurance one day after his discharge; applied to work at seven jobs in the space of three days; had a strong work ethic, as evidenced by the fact that he worked continuously from the age of 23 until his unlawful discharge at the age of 29; found work quickly after moving to Florida; and remained employed at that job through the end of the backpay period and thereafter).

In addition to the evidence demonstrating job search efforts that the Region obtains from the discriminatee, the Region can also use weaknesses in the respondent's evidence regarding substantially equivalent jobs to buttress the discriminatee's evidence. For example, as discussed above, a discriminatee is not reasonably required to apply for or accept jobs that are located relatively long distances from home, offer excessively low rates of pay, or for which the discriminatee is over or under-qualified.[28]

C. Respondent's ultimate burden of proof

Since the Board reaffirmed in St. George Warehouse that the respondent retains the ultimate burden of proof,[29] the Region should be prepared to argue that, even assuming the respondent has met its burden of production regarding the first element, the evidence submitted by the Region is more persuasive than that presented by the respondent, due both to the defects in the respondent's evidence as well as the strength of the evidence supporting the discriminatee's search for work.[30]

III. Conclusion

In sum, the changed burden allocation enunciated in St. George Warehouse increases the likelihood that Regions will have to litigate in compliance proceedings whether discriminatees conducted a reasonable search for work. This will require careful attention to the mandates of the Casehandling Manual.

---

[28] See Casehandling Manual, 10666.5. See also Florence Printing Company, 158 NLRB 775, 792-793 (1966), enfd. 376 F.2d 216, 220-221 (4th Cir. 1967); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d at 575; St. George Warehouse, Second Supplemental ALJD, slip op. at 9.

[29] St. George Warehouse, 351 NLRB No. 42, slip op. at 1.

[30] See Tower Industries d/b/a Allied Mechanical, Inc., 351 NLRB No. 110, slip op. at 3-4 (July 24, 2008) (ALJ, in concluding that the respondent had not met its ultimate burden of proving that the two discriminatees failed to conduct a reasonable search, analyzed both the defects in the respondent's evidence as well as the strengths in the General Counsel's evidence supporting the discriminatees' search efforts); St. George Warehouse, Second Supplemental ALJD, slip op. at 13 (same).

Any questions regarding the implementation of this memorandum should be directed to the Division of Advice.

/s/
R.M.

cc: NLRBU
Release to the Public

MEMORANDUM GC 09-01